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In The

# Supreme Court of the United States

October Term, 1971

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No. 71-647

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JAMES E. SIMON CO., INC., PETITIONER

V.

ARDELT-HORN CONSTRUCTION CO. and ST. PAUL FIRE & MARINE INSURANCE COMPANY, RESPONDENTS

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## REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### INTRODUCTION

Respondent St. Paul Fire & Marine Insurance Company ("St. Paul") has filed herein a "Brief in Opposition to Writ of Certiorari" with respect to the Petition for a Writ of Certiorari previously filed by Petitioner James E. Simon Co., Inc. In its Brief, Respondent first raises several arguments which Petitioner herein answers.

I.

**Respondent's Brief shows the conflict which exists between the decisions of this Court as well as other federal courts and the Eighth Circuit decision in this case.**

Petitioner is an unpaid subcontractor who performed the obligation Respondents had to the government on a federal construction project. Petitioner contends that

under traditional principles of equitable subrogation it is entitled to assert the rights of the government against Respondents. The support for Petitioner's contention is to be found in the historic right of one who performs the obligation of another to be subrogated to the *obligee's* rights against the obligor.[1]

Respondent St. Paul now apparently admits that Petitioner may be entitled to assert rights of equitable subrogation.[2] However, Respondent argues that equitable subrogation only entitles Petitioner to be subrogated to the rights of Respondents and not the government.[3] Thus, according to Respondent's analysis the doctrine of equitable subrogation entitles one who performs the obligation of another to be subrogated to only the rights of the *obligor* and not the obligee. In support of its argument the Respondent cites a decision of the First Circuit[4] as well as the opinion of the Eighth Circuit herein.[5]

While Respondent's analysis of equitable subrogation may be supported by the Eighth Circuit in its decision herein such analysis is contrary to a great body of other authority concerning the nature of the right of equitable subrogation[6] and the decisions of other federal courts.[7]

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[1] The essence of the concept of equitable subrogation is an entitlement to exercise the rights of the satisfied *obligee* against the *obligor*. 50 Am. Jur. Subrogation § 2 p. 679; and 83 C.J.S. § 1 p. 575. See Restatement of the Law of Restitution (1937) § 162; Restatement of the Law of Security (1941) § 141; "Reconsideration of Subrogative Rights of the Miller Act Payment Bond Surety", 71 Yale L.J. 1274 (1962).

[2] On p. 12 of its brief Respondent St. Paul asserts that Petitioner was acting as a "volunteer" and therefore not entitled to subrogative rights. Since Petitioner was obligated to perform work by virtue of a subcontract this cannot be true.

[3] See pp. 11-14 of Respondent's brief.

[4] See. pp. 11-12 of Respondent's brief quoting the case of National Shawmut Bank v. New Amsterdam Casualty Co., 411 F.2d 843 (1969).

[5] See p. 14 of Respondent's brief.

[6] Supra, n.1.

[7] See e.g. Industrial Bank of Washington v. United States (D.C.

These authorities and decisions support Petitioner's position that it is entitled by equitable subrogation to stand in the shoes of the government (the obligee) and assert the rights of the government (the obligee) against Respondents (the obligor). Therefore, the decision of the Eighth Circuit below and the opinion of the First Circuit[8] are far from being "in full accord with every other Court of Appeals which has considered any aspect of the question" as Respondents suggest.[9] On the contrary, these decisions reflect the ample confusion which exists over the application of the doctrine of equitable subrogation to federal construction contracts which it is submitted this Court should now clarify.

Respondent in its brief illuminates the importance of the erroneous concept of equitable subrogation adopted by the Eighth Circuit herein. As Respondent points out, to subrogate subcontractor to the rights of the prime contractor (the obligor) gives subcontractors no real rights or remedies whatsoever.[10]

This Court considered in the case of *Prairie State National Bank v. United States*, 164 U.S. 226 (1896) the same argument now presented by Respondent St. Paul in its brief. In the *Prairie State* case this Court conclusively rejected this argument.[11] In rejecting this argu-

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Cir. 1970) 424 F.2d 932 and Continental Casualty Co. v. United States, 169 F.Supp. 945 (Ct. Cl. 1959).

[8] Supra, n.4.

[9] See p. 5 of Respondent's brief.

[10] See p. 13 of Respondent's brief.

[11] In the Prairie State case this Court dealt with the rights of Hitchcock, a performance bond surety to be subrogated to the rights of the government against the prime contractor Sundberg & Company since Hitchcock had performed Sundberg & Company's obligation to the government to complete the work. This court stated:

"A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely 'in the rights of Sundberg & Co.' in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to

ment this Court in *Prairie State* followed the traditional principles of subrogation which entitle one who performs the obligation of another to be subrogated to the *obligee's* rights.

This Court specifically discussed and approved the vitality of the *Prairie State* opinion in the more recent case of *Pearlman v. Reliance Insurance Company*, 371 U. S. 132 (1962).

Respondent's argument emphasizes the conflict which exists between the Eighth Circuit's decision herein and this Court's opinions in the *Prairie State* and *Pearlman* cases. Respondent's argument also emphasizes the conflict between the Eighth and First Circuit's view of equitable subrogation on government projects and the view of the Court of Claims and other circuits.[12] It is important that this Court accept certiorari herein so that the Eighth Circuit's unduly restrictive views of the nature of equitable subrogation are not accepted as the law with the consequent unnecessary denegation of the rights and remedies of laborers and materialmen on government projects.

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the securities and remedies which the creditor, the United States, was capable of asserting against its debtor, Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contractor to appropriate the 10 per cent retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the 10 per cent and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company to the government, to be substituted to the rights which the United States might have asserted against the fund." (p. 416)

[12] Supra n.7

## II.

**Respondent's brief emphasizes the importance of this Court hearing and deciding critical questions concerning the equitable rights of laborers and materialmen on government projects.**

**A. Do the Miller Act's provisions for suits against the payment bond abolish by implication any equitable remedies against the performance bond?**

The Miller Act provided an additional payment bond[13] and included provisions regarding the procedures to be followed by claimants on that bond.[14] Respondent St. Paul interprets these provisions of the Miller Act to mean that Congress intended to preclude laborers and materialmen from enforcing their equitable rights against the performance bond because it did not expressly provide a procedure therefore.[15] Respondent even interprets judicial decisions construing these payment bond procedures as precluding any action against the performance bond.[16] The opinions below are cited by Respondent to support its contention.[17]

The question which should now be considered by this Court is whether Congress by providing for these payment bond procedures intended to abolish all equitable rights of subrogation against the performance bond. Petitioner contends that no such intention is present in the Miller Act and in its Petition herein presented authority supporting this contention.[18] Respondent's contention that the Miller Act abolished equitable remedies which have existed for hundreds of years conflicts with this Court's decision in *Pearlman*.[19]

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[13] MacEvoy Company v. United States, 322 U.S. 102 (1944).
[14] 40 U.S.C. § 270b.
[15] See p.p. 7-8 and 10 of Respondent's brief.
[16] See p. 15 of Respondent's brief.
[17] See p. 6 of Respondent's brief.
[18] See pp. 5-7 of Petition herein.
[19] See p. 7 of Petition herein.

The question of whether specific statutory procedures must be provided for before rights of equitable subrogation can be enforced should be considered by this Court. Petitioner contends that the argument that the absence of such procedures forecloses the right to equitable subrogation misconstrues the nature of the right which is an equitable right created and enforced by the courts to avoid unjust enrichment.[20] The right does not depend for its enforcement therefore on specific statutes. In fact no statute was followed by this Court in the *Pearlman* case or other cases enforcing the right of equitable subrogation.[21] The procedures for enforcement of such a right are those available to the government in whose shoes Petitioner is entitled to stand.

**B. Would the enforcement of the rights of equitable subrogation of laborers and materialmen destroy the priority of the government's rights against the performance bond?**

Respondent argues that Congress could not have considered giving laborers and materialmen rights against the performance bond "without according or detailing the obvious priority of the United States on such performance bond".[22] This contention is without merit since the equitable rights of laborers and materialmen cannot in any event interfere with the priority of the rights of the government against that bond.

It is only when the rights of the government have been fully satisfied that equitable rights of others can be enforced against the performance bond. This follows an important and long recognized principle of the doc-

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20 The Eighth Circuit has concurred with this view of the nature of equitable subrogation. See Martin v. Federal Surety Co., 58 F.2d 79 (1932) and National Garment Co. v. New York C. & L. St. L. R. Co., 173 F.2d 32 (1949).

21 Prairie State, supra.; Henningsen v. United States Fidelity and Guaranty Co., 208 U.S. 404 (1907).

22 See p. 8 of Respondent's brief.

trine of equitable subrogation.[23] Congress did not need to repeat this principle in the Miller Act in order to protect the government's interests.

In the instant case the rights of the government have been fully satisfied. The government's project has been performed and completed for it by Petitioner and others who have not been paid for their work. To now recognize the rights of equitable subrogation of laborers and materialmen against Respondents' performance bond does not in any respect violate the priority of the government's rights but in fact enforces those rights against Respondents who in equity and good conscience should pay for the performance of the project.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

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[23] See comment (c) to Section 162 of the Restatement of the Law of Restitution which reflects the principle that equity will not recognize the right of subrogation until the obligation is fully discharged. This reads as follows:
"c. *Where obligation not fully discharged.* Where property of one person is used in partially discharging an obligation owed by another, and the balance of the obligation has not been discharged, the former is not entitled to be subrogated to the position of the obligee. Until the obligation is fully discharged, the obligee is himself entitled to enforce the balance of his claim, and the person whose property has been used in discharging only a part of the claim is not entitled to occupy his position. If the balance of the claim is subsequently discharged by the obligor, however, the person whose property was used in discharging a part of the obligation is entitled then to be subrogated to the claim to the extent that his property was used in discharging the claim." (p. 655)

Respectfully submitted,

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